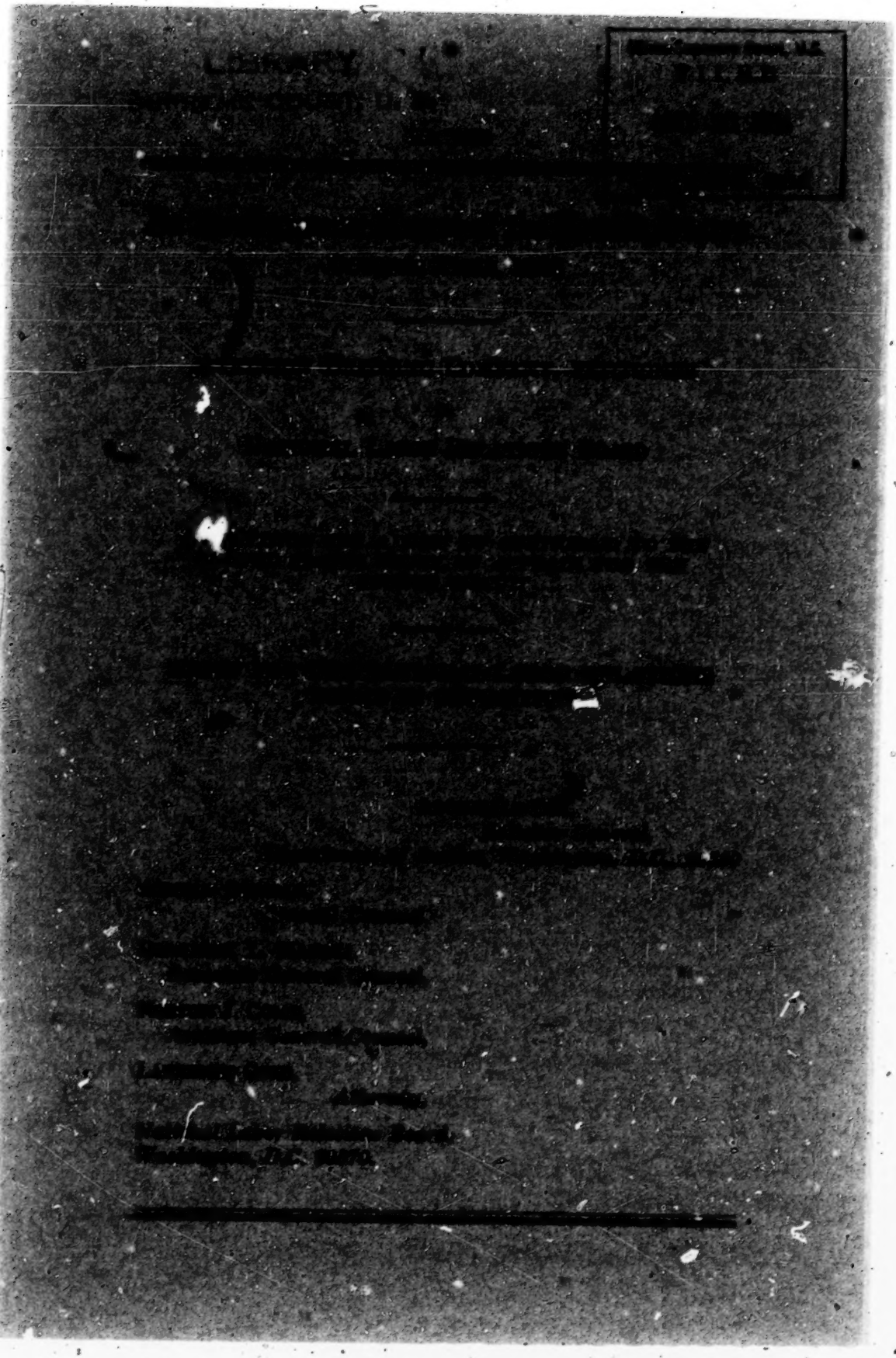

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1036

ATKINSON DREDGING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-11a) is not yet reported. The Board's decision and order (J.A. 1-17)[1] are reported at 141 NLRB 1316. The Board's decision in the underlying representation proceeding (J.A. 91-94, 114-116) is unreported.

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[1] "J.A." refers to the Joint Appendix in the court below, which was filed with the petition.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1964 (Pet. 1a, 11a). The petition for a writ of certiorari was filed on April 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that certain of the Company's employees, who were on temporary layoff or sick leave at the time of an election conducted by the Board, had a reasonable expectation of reemployment and thus were eligible to vote in that election.

STATUTE INVOLVED

The relevant sections of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), provide as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * *
>
> Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining

by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

STATEMENT

A. THE BOARD PROCEEDINGS

1. SUMMARY OF THE REPRESENTATION AND UNFAIR LABOR PRACTICE CASES

The Company is engaged in marine construction and land reclamation along the eastern shore between Virginia and Key West, Florida. It operates three dredges, the *Enterprise*, the *Northwood*, and the *Hampton Roads* (J.A. 3, 33). On April 6, 1961, the Board, upon a petition filed by International Union of Operating Engineers, Local Union 25, Marine Division, AFL-CIO, directed a representation election among the Company's employees employed during the payroll period ending April 1, 1961 (J.A. 4, 13-14, 22, 25).

At the election, conducted on May 4, 1961, thirty-five men sought to vote, including twenty-two whose names were not on the Company's eligibility list. In accordance with Board policy, the ballots cast by these twenty-two were challenged by the Board agent. Of the unchallenged ballots, five were for the Union and eight against (J.A. 4, 21, 31-32). Since there were sufficient challenged ballots to affect the election results and the challenges presented substantial issues

of fact, the Board ordered a hearing on the challenges. The hearing officer recommended that eight of the challenges be sustained and that fourteen be overruled (J.A. 31-77).

The Company filed exceptions to the rulings on ten of the fourteen challenges which the examiner rejected. It asserted that one of the ten men had been injured and had not returned to work; that two others were employed neither on April 1, the eligibility date, nor on May 4, the election date; and that the other seven were laid off prior to the election with no reasonable expectation of recall (J.A. 5, 78-85). The Board upheld the hearing officer's recommendation that fourteen of the challenged ballots be counted, but reversed one of the challenges which he had sustained (J.A. 5, 91-94). The result of including these fifteen additional ballots was that the Union won the election, fifteen to thirteen (J.A. 95). The Board certified the Union as the representative of the Company's employees (J.A. 114-116).

The Company refused to bargain with the Union, asserting that the certification was invalid because nine of the challenges were erroneously overruled (J.A. 7, 18-20).[2] A complaint was issued charging that the Company violated Section 8(a)(5) and (1) of the Act, and, after hearing, the Board so found (J.A. 1, 2-15). The Board ordered the Company to cease and desist from the unfair labor practice found

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[2] The Company did not renew its objection regarding one of the ten employees (Rose, see n. 3, p. 6, *infra*) whose ballot it challenged at the representation election.

and to bargain, upon request, with the Union (J.A. 14-15).

2. THE EVIDENCE RESPECTING THE NINE CHALLENGED EMPLOYEES AND THE BOARD'S CONCLUSIONS

The facts found by the Board, and its conclusions, respecting the nine employees as to whom the Company's challenges were overruled, are as follows:

Walton Gillikin.—Walton Gillikin worked for the Company on the dredge *Hampton Roads* in February 1961. On February 11, he injured his finger and, after receiving treatment from a doctor, was sent home by the Captain of the *Hampton Roads*. Walton Gillikin stayed at home for about a month, allowing his finger to heal, and then twice sent word back—once by a fellow employee and once by the Captain's brother—that he was ready to return to work. He was not recalled by the Company, and accepted employment with a plumbing company sometime after the eligibility date of April 1, but prior to the election date of May 4. This job lasted about six or eight weeks and he then accepted other employment (J.A. 70-71, 351-353). The informal procedure he followed in indicating his readiness to return to work was in accord with Company practice (J.A. 69, 71). Moreover, Company Vice-president Todd testified that an injured employee is still considered an employee if he expresses a desire to return to work after recovery (J.A. 70, 317). On these facts, the Board concluded that Walton Gillikin was an employee of the Company on temporary sick leave on April 1; that he had

thereafter manifested a readiness to return to work; that the other employment he obtained was only temporary; and that he was thus eligible to vote in the election (J.A. 70-71, 92-93).

Berkley Gillikin.—Berkley Gillikin was first employed by the Company on the dredge *Hampton Roads* in August 1955. During the next five years he was employed principally by the Company, pursuant to a pattern of layoff and recall. He was laid off in February 1961, when he was told that he would be recalled, and he was in fact recalled about April 15, 1961. He worked for the Company until May 1, 1961, when he was laid off with Vice-President Todd's promise that he would be recalled "after the election." Shortly after May 1, the *Hampton Roads* began a new dredging job but Berkley Gillikin was not recalled and he accepted a job with Construction Aggregates on May 5, 1961, the day following the election (J.A. 73-74, 184-189, 192-193). On these facts, the Board concluded that, in view of Berkley Gillikin's past history of layoff and recall, his recall on April 15 pursuant to a prior assurance, and the assurance, at the time of his May 1 layoff, that he would again be recalled, his layoff status on the April 1 eligibility date was temporary and did not disqualify him for voting in the election (J.A. 74).[1]

[1] The Board reached the same conclusion with respect to Leon F. Rose, whose situation was similar to that of Berkley Gillikin (J.A. 72-73). As noted (n. 2, p. 4, *supra*), the Company abandoned its challenge to Rose's vote.

The seven employees employed on the Enterprise.—Seven employees,[4] with varying records of previous employment with the Company, were all terminated on April 29, 1961, when the dredge *Enterprise* completed a project at Wilmington, North Carolina. They were told by Assistant Superintendent Masick or by the Captain either that the job was completed and that they would be laid off and called back when work was available or when other dredges had work, or that they would be transferred to the dredge *Hampton Roads*. However, the seven men were not recalled by the day of the election, May 4. (J.A. 33-39, 41-43, 64-65, 153, 159-160, 167, 174, 180, 198-199, 213.). The Board concluded that they were eligible to vote on May 4, 1961, because their layoff on April 29 was not in fact permanent, the men being assured of reemployment in the near future (J.A. 69, 93).

B. THE COURT OF APPEALS' DECISION

The court of appeals sustained the Board's findings as supported by substantial evidence, and enforced its order in full (Pet. 1a-11a).

ARGUMENT

The Company acknowledges (Pet. 7-8) that the Board and the court of appeals applied the correct principle of law in deciding whether employees not working at the time of a Board election are eligible

[4] Hugh Brown, White B. Brown, Dannie Gilliken, Hampton Leonard, Eldrod Robinson, R.D. Sellers, and C.R. Dixon, Jr.

to vote in the election, *i.e.*, whether the employee has a reasonable expectation of being recalled to work. See *Marlin-Rockwell Corp.* v. *National Labor Relations Board*, 116 F. 2d 586, 588 (C.A. 2), certiorari denied, 313 U.S. 594. Thus the only question presented is whether substantial evidence supports the Board's application of the principle in this case. Such an evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the facts summarized in the Statement (pp. 5-7) furnish ample support for the Board's conclusion that the employees in question had a reasonable expectation of further employment with the Company and thus were eligible to vote. As the court below stated (Pet. 8a):

> Respondent's [the Company's] hiring history indicates that it usually recalls workers with previous experience as dredging contracts are obtained. The dredging business is subject to fluctuation; yet Respondent continues operations and has not seen fit to liquidate. Thus, the number of workmen to be required at a given future date is uncertain, but the probabilities are that some unknown number will be employed. In this situation, Respondent's employees have made the necessary adjustments. When laid off by Respondent they seek employment with other dredging companies, turn temporarily to employment in other fields, or go on relief.
>
> * * * Although there is no seniority system with regard to layoffs and recalls, Respondent

> and if employees apparently have evolved an unofficial understanding that men with previous experience who live in the area will be recalled as jobs become available. This tacit understanding was made explicit in the present case by Respondent's officials indicating to nine discharged employees that their layoff was temporary and that they would be rehired. * * *

There is no substance to the Company's contention (Pet. 8-9) that the Board and the court below misapplied the reasonable-expectation-of-reemployment test by basing their determination whether the employee had such expectation on his subjective views rather than on objective considerations. As shown above, the Board's conclusion rested largely on the objective facts concerning the Company's layoff and recall history and the assurances of future employment which Company officials gave to the employees. But the employee's future job intentions are not irrelevant. The reason that an employee with a reasonable expectation of reemployment is entitled to vote is that such an employee "may well be concerned in the working conditions to which he will probably return and feed a lively interest in the selection of a collective bargaining representative." *Marlin-Rockwell, supra*. If an employee has no intention of returning to work for a particular employer, however, the purpose of the rule is not served by permitting him to vote in an election involving that employer merely because other

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The Court added that, although no such indication was made to Walton Gillikin, "he remained in an employee status while allowing an injury received on the job to heal" (Pet. 8a).

factors indicate that the employee could have been re-employed (had he so desired).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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NORTON J. COME,
Assistant General Counsel,

LAURENCE GOLD,
Attorney,
National Labor Relations Board.

MAY 1964.

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[1] There were valid reasons why the challenges of Bert Robertson, Graham Smith and Jerry Harrelson were sustained and those of the other seven employees laid off on April 29, 1961, were not (see Pet. 9). Employees Bert Robertson and Graham Smith did not testify at the Board hearing, and the Board found there was no evidence in the record to show the circumstances under which they were laid off, whether they had any expectancy of recall, or whether they were available had they been recalled (J.A. 76). As to Harrelson, the Board found that, unlike the other seven employees, he was not personally told, at the time of layoff on April 29, that he would soon be recalled (J.A. 72).

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